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IN THE

Supreme Court of the United States

October Term, 1969
No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

PETITIONER'S OPENING BRIEF.

Opinion Below.

These proceedings on certiorari are before this Honorable Court to review a decision of the Supreme Court of the State of California which is reported as *People v. Green,* 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422.

Jurisdiction.

The opinion of the California Supreme Court issued on March 21, 1969. On June 18, 1969, an order was entered extending the time for filing the petition for writ of certiorari to and including July 11, 1969 and, by further order, extended to July 25, 1969. The case was docketed on July 25, 1969, and certiorari was granted on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions and Statutes Involved.

This case involves the Sixth Amendment to the United States Constitution and sections 770 and 1235 of the California Evidence Code. These provisions are reprinted in the Appendix to this brief along with California Health and Safety Code section 11532, the section involved in the accusation against respondent.

Questions Presented.

1. Do the holdings of this Honorable Court in *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 and *Barber v. Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?

2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination by the accused and scrutiny as to demeanor by the trier of fact?

Statement.

History of the Case.

In an information filed by the District Attorney for the County of Los Angeles, respondent was accused of violating section 11532 of the California Health and Safety Code, furnishing, selling, and/or giving of a narcotic (marijuana) to a minor. (A. 1.) Respondent entered a plea of not guilty and waived trial by jury. (A. 2.) He was found guilty (A. 98), and his motion for a new trial was denied. (A. 101.) Proceedings were suspended and respondent was granted probation for five years. (A. 101.) One of the conditions of probation was that he serve one year in the county jail. He filed notice of appeal from the order granting probation. (A. 103.) Thereafter the Court of Appeal reversed the conviction on the ground that Evidence Code section 1235, which permitted the introduction of testimony given at a preliminary hearing for the truth of the matter asserted by a witness at the trial, was unconstitutional. (*People v. Green*, 265 A.C.A. 1, 71 Cal. Rptr. 100.) The petition of the People for a hearing on the constitutional issue in the California Supreme Court was granted, and following argument on the constitutional issue regarding the application of the confrontation clause of the Sixth Amendment, the California Supreme Court reversed the judgment on the ground that there was error of constitutional dimension in the admission of such prior inconsistent statements and that this holding was "impelled" by decisions of this Honorable Court. (A. 104-118.) The decision of the California Supreme Court was rendered on March 21, 1969.

Factual Statement.

In January of 1967, Melvin Porter, the minor to whom respondent was charged with furnishing the narcotic, was then age 16 years and had known the respondent for over four years. (A. 3-4.)

Porter acknowledged having used LSD (acid) a number of times and had been using marijuana about two or two and a half months prior to his arrest in late January, 1967. (A. 5.) At the trial, he testified that shortly after New Year's 1967, the respondent Green had called Porter at Porter's home and told Porter that he had some "stuff" that he wanted Porter to sell. (A. 5-6.) Porter at the trial testified that he did not recall whether Green brought something into the house on the day of the telephone call because he, Porter, was under the influence of LSD. (A. 7-8.)

At this point the People, pursuant to Evidence Code sections 1235 and 770, were permitted to impeach this testimony and to introduce for the truth of the matter asserted the testimony of Porter at the preliminary hearing in which Porter stated that respondent Green had told Porter in a conversation that he had a kilo of marijuana, that he was selling marijuana and that the marijuana came in 29 "baggies" in a large shopping bag. (A. 8-10.)

Porter at the trial stated that he could not recall how he had testified at the preliminary hearing, but that his testimony at that time was the truth as he believed it. (A. 11.) At the trial Porter maintained that he could not recall how he came into possession of the marijuana but that he did come into possession of 29 "baggies," that he smoked some of the marijuana, making it into

cigarettes. (A. 12-14.) He sold a few of the baggies and the rest were stolen from his closet. (A. 15-16.) Among the sales Porter made of this marijuana was a sale to Officer Dominguez. (A. 16.) At the trial, Porter testified that someone told him where he could find the marijuana but that he was not certain who the person was or where the marijuana was found. (A. 17-18.)

At this time, Porter was again impeached pursuant to Evidence Code Section 1235 by the reading of his testimony on cross-examination at the preliminary hearing. (A. 18-20.) At that hearing Porter testified that respondent Green came into his home on the 5th or 6th of January and told him that he had some "Grass" or marijuana to sell; that he wanted Porter to sell the stuff and to give Green the money when he got it, and that Green told him that the marijuana could be found at Green's father's home; that Porter got the shopping bag at Green's parents house and that Green showed him where it was. (A. 21-22.)

At the trial, Porter testified that he was telling the truth at the time he testified at the preliminary (A. 20), that he guessed that the reading of the questions and answers refreshed his recollection, mostly as to his testimony. Porter stated that of his own knowledge, with his recollection refreshed, he guessed he obtained the marijuana from the back yard of Green, and that Green told him where the marijuana could be found. (A. 22-23.) Porter testified that he sold some of the marijuana and thought that he gave the proceeds to Green. (A. 23.)

Officer Barry M. Wade, a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Di-

vision, had a conversation with Porter at the Juvenile Division Headquarters on January 31, 1967. (A. 27.) Officer Wade testified that Porter was sober at that time. Porter told Officer Wade that Green called him in the morning and stated that he had a kilo of marijuana and wanted to know if he (Green) could leave it at Porter's house. Green came to Porter's house later with a brown shopping bag containing 29 baggies of a green leafy substance which Porter recognized as being similar to marijuana. (A. 37.) This conversation was introduced for the truth of the matter asserted pursuant to Evidence Code sections 1235 and 770. (A. 28.)

It was stipulated at the trial that Porter said to Officer Wade that on previous occasions during the five months preceding his arrest Green brought large quantities of marijuana to Porter's home for storage and that Porter used a portion of this and paid Green therefor; that Porter sold marijuana to buyers who came to his home from the marijuana stored by Green and turned the money over to Green. (A. 74-75.)

Officer Ramon Dominguez, during January of 1967, was acting as an undercover officer attempting to purchase marijuana from narcotic sellers. (A. 43.) During this period (January 10) he purchased marijuana from Porter. (A. 44.) Officer Dominguez's testimony as to an appointment with Green was limited to the purpose of showing that Green and Porter had previous associations and were acquainted. (A. 48-54.) It was stipulated that the substance sold Dominguez by Porter was marijuana. (A. 45-46.)

As part of the defendant's case, the witness Porter was called for further cross-examination. (A. 56-68.) Porter testified that he had set up an appointment be-

tween Dominguez and Green. (A. 58.) Porter testified at the trial that Green wanted to sell Officer Dominguez $500 worth of peat moss if Dominguez wanted "grass" or baking soda if he wanted "acid." (A. 58.) Porter was asked about his testimony at the preliminary hearing relating to picking up the shopping bag at Green's parents' house and taking it to his house and also his statement to Officer Wade that Green brought the marijuana to Porter's house. He admitted that he had so testified and that he had talked to Officer Wade about buying some narcotics from Green and that he might have said Green wanted to leave it at his (Porter's) home, that he believed he was telling the truth when he talked to Officer Wade, when he testified at the preliminary and when he testified in court. (A. 58-60.) He testified that in January, 1967, he had told a Mr. Blackmore that he was going to get even with Green for repossessing a car which Green had sold him. (A. 60-61.) He admitted that Green brought over marijuana on a couple of occasions. (A. 64.)

Green testified on his own behalf at the trial, stating that he had sold a car to Porter in 1966 which Porter failed to pay for and which he had repossessed. (A. 76.)

Green testified that Porter called him in January and said that he thought he had sold marijuana to a police officer and asked Green to talk to the suspected officer to determine whether he was in fact an undercover agent. (A. 77.) Porter gave him (Green) the idea that he should attempt to sell the officer $500 worth of peat moss. Green testified that as a result of his conversation he (Green) called Officer Dominguez and at Porter's request arranged a meeting at the hot dog stand where the conversation to which Officer Dominguez had

testified took place. (A. 78.) Green testified that he had put aspirin in the coke because he assumed that an officer would not consume narcotics. Green denied that he sold marijuana to Porter, stating that on several occasions Porter had offered him marijuana to smoke but that he had refused. He said that he was familiar with the going price of narcotics because he had heard persons talk about it. (A. 79-80.)

Summary of Argument.

The confrontation clause of the Sixth Amendment to the United States Constitution secures for an accused one of the basic rights of a fair trial, the opportunity to have full cross-examination of the witnesses against him and, as a secondary right, that of compelling a witness to stand face to face before the trier of fact in order that the trier may judge of the demeanor of the witness and, from the manner in which he gives his testimony, determine whether he is worthy of belief. This has been the clear interpretation of that clause by this Honorable Court. This Court has *not* held that prior utterances of a witness may not be given substantive effect or that confrontation is denied an accused if prior statements are received in evidence of a witness who is present in court and the accused is afforded an opportunity to cross-examine him. The holdings of this Court, recent and past, do not "impel" the conclusion reached by the California Supreme Court that a statute admitting prior statements for the truth of the matter asserted violates the confrontation clause of the Sixth Amendment. It is not the mandate of the United States Constitution that only a "contemporaneous" utterance of a witness may be admitted before a

trier of fact; there is no mythical necessity that a case must be decided only in accordance with the truth of words uttered under oath in court. Accordingly, the California Supreme Court has misinterpreted the holdings of this Court.

The confrontation clause of the Sixth Amendment does not prevent the states or the Committee on Rules of Evidence of the Judicial Conference from adopting rules admitting, for the truth of the matter asserted, prior statements of a witness who is subject at trial to cross-examination; such rules are advocated by modern and enlightened legal and judicial authorities. The provisions of the United States Constitution apply uniformly across this nation and this Honorable Court is the final arbiter of the scope and object of its provisions, including the confrontation clause of the Sixth Amendment. A holding of a state court not in accord with this Court's decisions interpreting that clause should be reversed and proper guidance given to those authorities, state and federal, developing rules of evidence to govern the judicial proceedings in our courts. The recent decision of the California Supreme Court clearly indicates the necessity for such guidance and it is the contention of petitioner herein, that the judgment of the California Court, premised as it is on a misconception of this Court's holdings on a federal Constitutional question, should be reversed.

ARGUMENT.

I.

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope and Object of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial.

A. The Scope and Object of the Right of Confrontation as Articulated by This Honorable Court.

This proceeding is before this Honorable Court on the granting of the petition of the State of California in which it was contended that the Supreme Court of California improperly held unconstitutional California Evidence Code section 1235[1] upon an unwarranted construction of the Sixth Amendment to the United States Constitution and a misinterpretation of the holdings of this Court articulating the scope and object of the confrontation clause of that amendment.

The Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, provides that in all criminal prosectuions the accused shall enjoy the right to be confronted with the

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[1]California Evidence Code section 1235 provides:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770" (See Appendix)

witnesses against him.[2] *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, held that the right of confrontation includes both the opportunity to cross-examine and the occasion for the jury (trier of fact) to weigh the demeanor of the witness.

This Court has held that one of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witness against him."

Kirby v. United States, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574.[3]

In *Greene v. McElroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 1391, 79 S. Ct. 1400, it was stated that certain principles remain immutable in our jurisprudence and these protections have been formalized in the requirements of confrontation and cross-examination. As Wigmore said (5 Wigmore Evidence, 3rd Ed. Sec. 1364) they are basic ingredients in a fair trial.

This Honorable Court has said that the primary object of the confrontation clause was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against a prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the con-

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[2]The California Constitution has no similar provision. *See* California Penal Code section 686, California Evidence Code 711.

[3]See also:
Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956;
Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314.

science of the witness but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242, 39 L. Ed. 409, 411, 15 S. Ct. 337.

A primary interest secured by the confrontation clause is the right of cross-examination and an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.

Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 934.

In *Pointer v. Texas, supra,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065, it was said that a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witness against him.

Dowdell v. United States, 221 U.S. 325, 330, 55 L. Ed. 753, 757, 31 S. Ct. 590;

Motes v. United States, 178 U.S. 458, 474, 44 L. Ed. 1150, 1156, 20 S. Ct. 993;

Kirby v. United States, 174 U.S. 47, 55-56, 43 L. Ed. 890, 893, 19 S. Ct. 574.

In *Pointer v. Texas, supra,* the witness who had testified at the preliminary hearing was *not available* at the trial for confrontation *and cross-examination,* and in that case the defendant, because of lack of counsel at the preliminary hearing, was denied the meaningful cross-examination by counsel required by the confrontation clause of the United States Constitution.

In *Barber v. Page, supra,* likewise, the declarant *did not confront* the defendant at the trial and no effort had been made to procure his presence for confrontation and cross-examination at the trial prior to the introduction of the testimony taken at the earlier hearing. Accordingly, this Honorable Court held that there had been a denial of confrontation.

In *Barber v. Page, supra,* this Honorable Court noted that there was no confrontation at the trial and no adequate showing to dispense with actual confrontation. It was said,

> ". . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."

In *Berger v. California,* 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508, it was noted that the petitioner's inability to cross-examine an absent witness at trial might have had a significant effect on the integrity of the fact-finding process and that in *Barber v. Page,* one of the important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses.

In *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, this Court said:

> "We applied Pointer in Douglas v. State of Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as a

witness against him. An appeal was pending from Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas 'the right of cross-examination secured by the Confrontation Clause.' 380 U.S., at 419, 85 S.Ct. at 1077. We noted that '* * * effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer.' Id., at 420, 85 S.Ct. at 1077. The risk of prejudice in petitioner's case was even more serious than in Douglas. In Douglas we said, 'Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.' Id., at 419, 85 S.Ct. at 1077. Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly

> before the jury during their deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. *Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.*" (Emphasis added.)

As was implicit in this Honorable Court's holding in *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726, where one of the declarants was present in court and testified and was subject to cross-examination by counsel for the defendant, no denial of the right of confrontation as to him was presented. This had been the holding in the Court of Appeal, Ninth Circuit, prior to the decision in *Harrington. See: Rios-Ramirez v. United States,* 403 F. 2d 1016, 1017, certiorari denied April 1, 1969, 89 S. Ct. 1292; *Santoro v. United States,* 402 F. 2d 920, 922-923 (9th Cir.).

In *Santoro v. United States, supra,* 402 F. 2d 920, 921-923, the court discussed the scope of the holding in *Bruton* as follows:

> "On this remand, we are asked to decide whether the introduction at trial of the post-arrest statements of codefendants LaMagna, Coduto and Haynes violated appellant's right of confrontation secured by the sixth amendment. After careful reconsideration in light of Bruton v. United States supra, we hold that appellant's rights were not vio-

lated and, hence, affirm the conviction below, for the reasons which follow.

"In Bruton, the out of court confession of the petitioner's codefendant, Evans, that the latter and petitioner had committed armed robbery, was admitted in evidence. Evans did not testify at trial and, therefore, was not subject to confrontation or cross-examination by Bruton. The trial court, relying upon Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), instructed the jury that the declarant's confession inculpating the petitioner had to be disregarded in determining the latter's guilt or innocence. Overruling Delli Paoli and reversing the conviction, the Court in Bruton held that it could not accept limiting instructions as an adequate substitute for the petitioner's constitutional right of cross-examination. The only acceptable course under the circumstances was exclusion of the confession.

In its opinion, the Court stated:

'Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.' Id., 391 U.S. at 127-128, 88 S. Ct. at 1623.

"The Court concluded:

" 'The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.' Id., at 136, 88 S. Ct. at 1628.

"Thus, the Court emphasized that Bruton's rights were violated because he could not cross-examine his codefendant.

"Contrary to the case in Bruton, the three defendants whose out of court statements incriminated appellant Santoro all took the stand (as did appellant himself). Thus, appellant had an opportunity to confront and cross-examine those persons whose statements inculpated him. Indeed, defendants LaMagna, Coduto and Haynes were thoroughly questioned and cross-examined by the Government at trial. (Their testimony covers some 150 pages of the transcript.) Therefore, the confrontation rationale of Bruton is not applicable in the present case."

See also: *Wade v. Yeager*, (3rd Cir.) 415 F. 2d 570, 572.

In *Rios-Ramirez v. United States, supra*, 403 F. 2d 1016 (cert. denied April 1, 1969, 89 S. Ct. 1292), it was said:

"The question we must now decide is whether the admission at appellant's joint trial of extra-judicial statements made by appellant's codefendant, Manzano, allegedly incriminating appellant, violated appellant's right of cross-examination secured by the confrontation clause of the sixth amendment. After careful reconsideration in light of Bruton and cases based thereon, we hold that appellant's rights were not violated and, hence, affirm the conviction below, for the reasons which follow.

"We recently had occasion to discuss the holding in Bruton and apply the principles expounded

therein. In Santoro v. United States, 402 F.2d 920 (9th Cir. October 31, 1968), we noted that the Supreme Court had held that petitioner Bruton's 'constitutional right of cross-examination' had been denied where the Government introduced the out-of-court confession of the petitioner's codefendant which implicated the petitioner, where the codefendant did not take the stand and was, therefore, not subject to confrontation and cross-examination by the petitioner. We then held in Santoro that because the appellant's three codefendants all took the stand, the appellant had an opportunity—unlike Bruton—to confront and cross-examine the witnesses against him, and thus appellant Santoro's rights were not denied him.

"In the present case, counsel for appellant Rios-Ramirez does not indicate which extrajudicial statements he finds objectionable in light of Bruton. From our study of the record, however, it would appear that the objectionable statements appear at pages 334 and 359 of the Reporter's Transcript. In the first instance, Agent Saiz testified for the Government:

"As in Santoro, and contrary to the case in Bruton, defendant Manzano in the present case took the stand and testified regarding the subject of her out-of-court statements. Much of her direct testimony concerned appellant Rios-Ramirez. (See R.T. 565-580.) Following her direct testimony, defendant Manzano was thoroughly cross-examined by appellant's attorney. (See R.Tr. 582-599.) (In this case, each defendant was represented by separate counsel.) Thus, appellant not only had an

opportunity to confront and cross-examine the person whose statements inculpated him, but he in fact took advantage of this opportunity and exercised his constitutional rights. *Under these circumstances, we do not see how appellant can claim that his right of cross-examination, secured by the confrontation clause of the sixth amendment, has been violated.*" (Emphasis added.)

In *Gilbert v. California,* 388 U.S. 263, 272 (Footnote 3), 87 S. Ct. 1951, 18 L. Ed. 2d 1178, this Court noted that there is a split of authority on the admissibility of prior extra judicial identification as independent evidence of identity. It was therein stated that the recent trend is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See: Annotation, 71 A.L.R. 2d 449-552.

In *De Carlo v. United States,* 6 F. 2d 364, 368, Judge Learned Hand noted that a witness who is asked about prior statements is present before the jury and they may gather the truth from his whole conduct and bearing, even if it be in respect to contradictory answers he may have made at other times. Judge Hand said that the possibility that the jury may accept as the truth the earlier statements in preference to those made on the stand presents no difficulty. If they decide what he said before was the truth and not what he says now, they are none the less deciding from what they see and hear of that person and in court, "There is

no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in Court."

See: Curtis v. United States, (10th Cir.) 67 F. 2d 943, 946.

Wigmore in his work on Evidence details the development of Confrontation, including the definition by this Honorable Court in some of the cases heretofore cited, sections 1395-1397. He concludes that the process of confrontation has two purposes:

(1) The main and essential purpose is to secure for the opponent the opportunity of cross-examination. He notes that this is the true and essential significance of confrontation, as clearly shown from the beginning of the Hearsay rule to the present day.

See cases and authorities cited, 5 Wigmore (3rd Ed.), section 1395, pp. 123-125.

(2) A secondary advantage (referred to as subordinate) to be obtained from personal appearance of the witness was that the judge and the jury were enabled to see and hear the witness (pp. 125, 126).

Wigmore states that in the United States almost all Constitutions have given a permanent sanction to the principle of Confrontation by clauses requiring that in criminal cases the accused shall be "confronted with the witnesses against him", or "brought face to face with them." *See* 5 Wigmore (3rd Ed.) section 1397 and cases and constitutional and statutory provisions set forth in the footnote pages 127-130.

Wigmore says that there never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was invoked in and secured by confrontation; it was the same right under different names. Thus, it follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.

Wigmore concluded that the rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all exceptions that may legitimately be found, developed, or carved therein.

And, in *Snyder v. Massachusetts,* 291 U.S. 97, 107, 54 S. Ct. 330, 78 L. Ed. 674, it was noted that the privilege of confrontation has not been at any time without recognized exceptions. The Court continued, "The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason for the rule.

See Kay v. United States, (4th Cir.) 255 F. 2d 476, 480-481;

United States v. Leathers, (2d Cir.) 135 F. 2d 507, 511.

In *Salinger v. United States,* 272 U.S. 542, 548, 47 S. Ct. 173, 71 L. Ed. 398, this court stated:

> "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions."

After citing previous cases on the issue, the Court concluded,

> "The present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited."

With the foregoing analyses of the scope of confrontation as defined by this Court, we now will review the interpretation given to that clause and the recent holdings of this Court by the California Supreme Court.

B. The Interpretation of This Court's Rulings by the California Supreme Court.

The California Supreme Court purporting to interpret the recent decisions of this Honorable Court, has held that the confrontation clause does not permit the introduction of prior inconsistent statements of a witness even though he is subject to cross-examination at the trial and to the view of the trier of fact.

As is evident from a review of the record in the trial court in this case, the witness Porter, whose prior statements are in issue, confronted the defendant Green at trial, was subject to cross-examination and his demeanor in testifying was subject to the scrutiny of the trial judge, who was the trier of fact; additionally, Porter was available and was called for further cross-examination during the defendant's case in chief. Green also had confrontation with counsel present at the preliminary hearing and was afforded a full opportunity to cross-examine this witness under oath at that time.

Despite the clear guidelines set forth in the cases decided by this Court relating to the confrontation clause, the California Supreme Court, following its earlier venture in interpreting the Sixth Amendment in *People v. Johnson*,[4] 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, *cert. denied* 1969, 89 S. Ct. 679, said (at page 701, 70 A.C.):

> ". . . Our decision was *impelled* by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., Pointer v. Texas (1965) 380 U.S. 400; Barber v. Page (1968) 390 U.S. 719.)" (Emphasis added.)

Notwithstanding the decisions to which reference is made herein, the California Supreme Court said that this Honorable Court has held that the opportunity for cross-examination before the ultimate trier of fact was not satisfaction of the "*contemporaneous*" confrontation mandate of the Sixth Amendment because it was "not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal." In explanation of this interpretation the California Court said (80 A.C. at 703-704):

> "The import of Barber and other recent Supreme Court decisions was spelled out in Johnson: These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, *i.e.*, before the same

[4]See critical discussion of *Johnson* in 15 Wayne Law Review 874.

trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand. (Italics in original.) (People v. Johnson (1968), supra, 68 Cal. 2d 646, 659, 660.) We reiterate that the 'contemporaneous' cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be nunc pro tunc nor may it be tunc pro nunc.[4]" (Footnote omitted.)

The petitioner herein contends that defining the scope and object of the United States Constitution is the exclusive function under that document of this Honorable Court and that other courts may not in the guise of "interpretation" of the decisions of this Court, alter the meaning of the terms contained therein as defined by this Court. The United States Constitution is uniformly applied and its terms are interpreted by this judicial body in accord with its mandate.

It is respectfully submitted that this Court has not interpreted the confrontation clause of the Sixth Amendment to limit the power of state legislatures and courts and the federal courts in enacting legislation or adopting rules permitting the admission for the truth of the matter asserted of prior statements of a witness who is available at trial for cross-examination and whose demeanor is subject to the scrutiny of the trier of fact.

It is evident that there was no denial of the right of confrontation to the defendant in the instant case and that the California Supreme Court was *not* "impelled" by this Court's recent decisions to hold that there was a violation of the Sixth Amendment to the United States Constitution.

II.

To Permit the Interpretation of the Confrontation Clause of the Sixth Amendment Made by the California Supreme Court to Stand as the Declaration of This Honorable Court Would Deter the Adoption by the State Courts and Legislatures, and the Committee on Rules of Evidence of the Judicial Conference of the United States, of Rules Admitting for the Truth of the Matter Asserted Prior Statements of a Witness Who Is Subject at Trial to Cross-Examination in Accord With Modern and Enlightened Authorities.

The petitioner herein contends that the misinterpretation of this Honorable Court's holdings on the scope of the Confrontation Clause by the California Supreme Court may prevent admission in evidence of relevant prior statements of witnesses at the trial, as well as precluding admission in evidence of previously accepted exceptions to the hearsay rule; that such a misinterpretation could prevent adoption of enlightened and progressive legislation and rules of evidence by the various states and by the Federal Courts.[5] Eminent authorities have recognized the worth of the rule of evidence enacted in California Evidence Code section 1235 in the as-

[5]See discussion *infra*, in regard to the Proposed Rules of Evidence for the Federal District Courts and Magistrates.

certainment of the truth at trial. A discussion of some of those authorities follows:

The American Law Institute Model Code of Evidence Rule 503(b) would permit admission in evidence of hearsay declarations if the judge finds that the declarant is present in court and subject to cross-examination.

In discussing the pertinent portion of this rule the comment is as follows:

> "As to clause (b) the declarant is always present and subject to cross-examination. If he purports to remember the pertinent matter, the adversary is fully protected and the jury is in a favorable position to place a fair value upon the declaration in combination with declarant's present testimony. If the judge believes that the increment of value which the declaration would add to the present testimony of the witness is negligible, he may exclude evidence of the declaration under Rule 303. If the witness now purports to have no recollection of the matter or insists that he never had any knowledge of it, the need for the evidence is just as great as if he were unavailable. Moreover both the adversary and the jury are in a more advantageous position to evaluate the evidence than they would be if the declarant were not subject to present cross-examination. They need not rely solely upon the witness who reports the declaration; they have him and the declarant before them, and can make up their minds whether to believe either or neither of them."

Rule 63(1) of the Uniform Rules of Evidence provides for the admissibility of previous statements made

by a person who is present at the hearing and is available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness. The commissioners of the Uniform Code comment that this adopts the American Law Institute Model Code of Evidence and note that this rule has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross-examination were not impaired and that court decisions have admitted evidence of prior inconsistent statements for its full value not limited merely to impeachment. The commissioners further note that when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

See: Falknor, "The Hearsay Rule and Its Exceptions, 2 U.C.L.A. Law Review, 43, 48-55.

Professor McCormick in his work on Evidence, section 39, pp. 73-82, presents compelling arguments in support of the rule codified in California Evidence Code section 1235. Among the many advantages of such a rule he notes that it effectively deals with the "turncoat witness" and permits introduction of the more reliable earlier statements since they are made nearer in time to the event related. He points out that the important requirement of confrontation, cross-examination, is preent and that this is the most essential safeguard.

Wigmore, who first approved the orthodox view on the subject, has in the latest edition concluded that the natural and correct solution is to admit prior incon-

sistent statements as having affirmative testimonial value when the witness is present and subject to cross-examination.

3 Wigmore (3rd Ed.), section 1018, pp. 687-688.

In discussing the Orthodox Rule, that prior self contradictions are not to be treated as having any substantive or independent testimonial value, Wigmore says that the only ground for treating such statements as having no affirmative testimonial value would be the Hearsay Rule. "But," says Wigmore, "the theory of the Hearsay Rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination." Wigmore then notes that the whole purpose of the Hearsay Rule has been satisfied. Hence, there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve; the one statement is as useful as the other and, Wigmore concludes, everday experience outside of courtrooms is in accord.

3 Wigmore (3rd Ed.) Sec. 1018, pp. 687-688.

See also Ladd, *Impeachment Of One's Own Witnesses —New Developments,* 4 U. Chi. L. Rev. 69 (1936); Maguire, Evidence, *Common Sense and Common Law,* at pages 59-63 (1947); McCormick, *The Turncoat Witness: Previous Statements As Substantive Evidence,* 25 Texas L. Rev. 573 (1947); Morgan, *The Hearsay Dangers and The Application of The Hearsay Concept,* 62 Harv. L. Rev. 177 (1948) at 192-196; Morgan,

The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481 (1946), at 545-555.

In *Gelhaar v. State,* 163 N.W. 2d 609, the Wisconsin Supreme Court recently held that a jury should be able to consider the prior inconsistent statements of a witness as substantive evidence.

In discussing some of the authorities cited above the Wisconsin court said:

> "Professor McCormick contends that the two safeguards of the truth of testimony are the oath (with its penalty for perjury) and cross-examination. Of these, the most important is cross-examination. But, for all practical purposes, this safeguard is available when extrajudicial statements are used to impeach a witness.
>
> "'* * * It is hard to escape the view that evidence of a previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in a high degree the safeguards of examined testimony.
>
> "'Accordingly, if we look to the procedural guaranties of truth of the prior statement and of the present testimony of the same witness, we can only conclude that they stand approximately equal, * * * McCormick, supra at page 75.
>
> "But another factor makes the *prior* inconsistent statement even more trustworthy than testimony.
>
> "'* * * The prior statement is always nearer and usually very much nearer to the event than is the testimony. * * *
>
> "'* * *

"'Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy. No, but the time-element plays an important part, always favoring the earlier statement, in respect to all of these hazards.* * *'

"McCormick, *supra*, at pages 75 and 76.

"There is a further reason favoring the use of prior statements substantively. The attempt to deny the full probative effect to such statements is, even charitably considered, usually ineffectual. The evidence of prior statements goes to the jury anyway as impeaching evidence, but the jury is ordinarily instructed that it can consider the evidence solely as bearing on the credibility of the witness.

"'* * * Such an instruction, as seems to be generally agreed is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture. If the prior statement and the present testimony are to be considered and compared, what is the purpose? The intuitive good sense of laymen and of lawyers seems to agree that the only rational purpose is not merely to weigh the credibility of the testimony, but to decide *which of the two stories is true.* To do this is ordinarily to decide the substantive issue.'

"McCormick, *supra,* at page 77.

"Then McCormick discusses a subject which is particularly pertinent to this appeal. When the state's only witness to a material fact in a criminal case is cross-examined by a prior inconsistent statement, the jury can use the inconsistent statement to cancel the witness' testimony. Thus it makes no difference whether the statement is considered as 'substantive' or 'impeaching' evidence. The result is the same, i.e., a verdict for the defendant. But when the state has only an inconsistent statement from the defendant's witness, it cannot even get to the jury. Basically that is what defendant is contending here. The only evidence of intent could come from the children. Even if their testimony at the trial is disbelieved by the jury, there is no 'substantive' evidence of intent in the case.

"'* * * The argument seems persuasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself.' McCormick, supra, at page 78.

"Thus we are now convinced that a jury should be able to consider the prior inconsistent statements of the witnesses as substantive evidence. Previous Wisconsin cases which have held to the contrary are therefore expressly overruled."

The Court of Appeal in Kentucky in a recent decision, *Jett v. Commonwealth,* reported in 436 S.W. 2d 788, at 792, refers to the direct and sensible approach set

forth in the Model Code of Evidence and the Uniform Rules of Evidence. The court reasoned:

> "That the out-of-court statement is hearsay, and not given under oath, is the traditional reason why it is generally held not admissible as substantive testimony. That cannot, however, be the reason for denying its admission for purposes of impeachment, because even in those cases where proof of contradictory statements is clearly admissible they are still second-hand. 'In short, the *prior statement is not primarily hearsay,* because it is not offered assertively, i.e., not testimonially. The Hearsay Rule * * * simply forbids the use of extrajudicial utterances as credible *testimonial* assertions; the prior contradiction is not offered as a testimonial assertion to be relied upon. It follows, therefore, that the use of prior self-contradictions is not obnoxious to the Hearsay Rule.' Wigmore on Evidence (3d ed.) § 1018 (Vol. III, p. 687). The real basis for its exclusion in the case where the witness has merely failed to come through with something the examiner wanted him to say is that there is nothing to impeach. If he has not said anything damaging to the examiner, there is no purpose to be served by an attack on his credibility. In such a case the only real purpose the out-of-court statement could serve is to supply substantive evidence in the guise of impeachment. That is, of course, the practical effect of such testimony anyway, and a number of the greatest text writers and jurists of our time have agreed that the 'artificial rule' against admitting, as substantive evidence, out-of-court statements made by a witness should be either

relaxed or completely abandoned. Cf. Wigmore on Evidence (3d ed.), §1018, (Vol. III, p. 687); McCormick on Evidence, § 39, (pp. 73-82). Both the Model Code of Evidence (Rule 503)[2] of the American Law Institute and the Uniform Rules of Evidence (Rule 63)[3] admit evidence of a hearsay declaration previously made by a person who is present and subject to cross-examination provided the statement would be admissible if made by the declarant while testifying as a witness.

" 'The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate exactly. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part." ' " Edmund M. Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept,' 62 Harv. L. Rev. 177, 192 (1948).

"When both the person who is said to have made the out-of-court statement and the person who says he made it appear as witnesses under oath and subject to cross-examination there is simply no justification for not permitting the jury to hear, as substantive evidence, all they both have to say on the subject and to determine wherein lies the truth. The direct and sensible approach set

forth in the Model Code of Evidence and the Uniform Rules of Evidence eliminates the necessity of distinguishing[4] between a 'contradiction' and that which from a technical standpoint is not so much contradictory as it is supplementary—that is between 'positive' and 'negative' testimony given by the first witness. We are of the opinion that when a witness has testified about some of the facts of a case the jury should know what else he has said about it, so long as it is relevant to the merits of the case as distinguished from collateral issues. Our opinions to the contrary, beginning with Champ v. Commonwealth, 59 Ky. (2 Metc.) 17, 74 Am.Dec. 388 (1859), and including both those that apply to one's own witness and those that apply to the adversary's witness, are overruled." (Footnotes omitted)

The Second Circuit Court of Appeals, speaking through Judge Friendly in *United States v. De Sisto* (1964), 329 F. 2d 929, *cert. denied,* 377 U.S. 979, gave substantive effect to a prior identification of the accused to supply an element in support of a jury verdict. Squarely faced with the question of the evidentiary status of prior inconsistent statements, the court well stated the position of petitioner at page 933:

"The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachornism 'that still impede(s) our pursuit of the truth.' [Citations omitted.] The sanctioned ritual seems peculiarly absurd when a wit-

> ness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75-76 (1954). . . ."

See also United States v. Armone (2nd Cir. 1966), 363 F. 2d 385 [De Sisto followed]; *United States v. Schwartz* (E.D. Pa. 1966), 252 F. Supp. 866, and also Judge Learned Hand's discussion in *Di Carlo v. United States, supra* (1925), 6 F. 2d 364, *cert. denied,* 268 U.S. 706, espousing the principles later adopted in California Evidence Code section 1235.

In March of 1969, the Advisory Committee on Rules of Evidence presented to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts

and Magistrates. These rules would admit the evidence that the California Supreme Court has held inadmissible under the holdings of this Honorable Court. See Rule 8-01,(c)(2).

In discussing this rule the Advisory Committee said (46 F.R.D. 161, 336-337):

> "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:
>
> "'Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who

changes his story on the stand and deprives the party calling him of evidence essential to his case.' Comment, California Evidence Code § 1235. See also McCormick § 39.

"The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. Reptr. 599, 441 P. 2d 111 (1968). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements."

See the endorsement contained in the Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates, February 1970.

See also:

15 Wayne Law Review 1086-1101; 48 F.R.D. 62.

The need for a declaration on this important question by this Honorable Court is evident. The final arbiter of the scope of the commands of the Federal Constitution on the states and Federal Courts is this Court.

The California Supreme Court has said the result reached by it in the instant case was "impelled" by the decisions of this Court interpreting the Confrontation Clause of the Sixth Amendment. If this is incorrect, but permitted to stand as an interpretation of this Court's holdings on the question, the Committee on Evidence for the Federal Courts, as well as the

State courts and legislatures, may be deterred from fully considering this sensible and enlightened rule of the modern progressive authorities. If the California Court is right, the authorities heretofore cited to the contrary notwithstanding, this Court should also speak on the matter to properly supervise the proceedings that may occur in the Federal Courts in event of the adoption of this rule.

The need for such an authoritative adjudication on the matter is clearly stated by the California Supreme Court in a later decision on the subject of the interpretation to be accorded the right of confrontation under the decisions of this Court. In *In re Hill*, 71 A.C. 1039, 80 Cal. Rptr. 537, 458 P. 2d 449, in discussing the rule announced in *Bruton, supra,* and in holding that it should even be extended to a situation where the extrajudicially confessing codefendant takes the stand and is subject to cross-examination, the court said:

> "Nor are we persuaded to the contrary by the recent case of Harrington v. California (1969) 395 U.S. 250 [23 L.Ed.2d 284, 89 S.Ct. —]. There each of Harrington's three codefendants confessed and each confession was introduced at their joint trial with limiting instructions. One of the confessing codefendants also took the stand and was cross-examined by the defendant's counsel. The Supreme Court characterized the question before it to be whether the Bruton error in the admission of the confessions of the two codefendants who did not take the stand was harmless under Chapman v. California, (1967) 386 U.S. 81 [7 L.Ed.2d 705, 87 S.Ct. 824]. How-

ever, the court did not deal with the question of whether there was Bruton error in the admission of the confession of the codefendant who did testify. Nothing in the court's opinion indicates that it felt that the admission of such confession was not error under Bruton and its failure to treat the issue indicates nothing more than that it was not raised by counsel. We do not draw any inferences from Harrington which would cause us to hold in the instant case that the admission of Madorid's confession was not error because he took the stand and testified at trial. *Until such time as the Supreme Court affirmatively indicates that cross-examination of the confessing codefendant at trial is adequate under the confrontation clause, we feel compelled to hold that the admission of his confession is constitutional error of the type condemned by Bruton.*" (Emphasis added.)

It is submitted that the need for an authoritative adjudication on the matter by this Honorable Court is clear.

This Court has recognized, and has consistently refused to abdicate its obligation, particularly in the exercise of the supervisory power over the federal courts, to decide questions involving federal Constitutional issues in order that the lower federal courts and the courts and Legislatures of the various states may conform their behavior to the commands of the Constitution.

Petitioner submits that the California Supreme Court's decisions present a question requiring a Constitutional decision from this Court on a question of

importance not only to the State of California but to the other states and the federal courts. The guide lines given to California will aid those throughout the nation who strive for the proper development of rules for the administration of justice in our courts.

Inasmuch as the holding of the California Supreme Court is not in accord with this Court's decisions that holding should be reversed and guidance given thereby to the authorities, state and federal, engaged in promulgating rules of evidence.

Conclusion.

The judgment of the California Supreme Court, premised as it is on a misconception of this Court's holdings on a question of federal Constitutional dimension, should be reversed and petitioner requests a reversal.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved.

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code section 770.

§770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code section 1235.

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1965, c. 299, § 1235.)

California Health and Safety Code section 11532.

§ 11532. Every person of the age of 21 years or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale or peddling any marijuana, or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any marijuana to a minor, or who induces a minor to use marijuana in violation of law, is guilty of a felony punishable by imprisonment in the state prison from 10 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

If such a person has been previously convicted once of any felony offense described in this division or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previ-

ous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison.

If such a person has been previously convicted two or more times of any felony offense described in this division or has been previously convicted two or more times of any offense under the laws of any other state, or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 15 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 15 years in prison.

(Added by Stats. 1959, Ch. 1112; amended by Stats. 1961, Ch. 274.)